LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JAN 22 1955
HAROLD B. WILLEY, Clerk

No. 367

In the Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL POWER COMMISSION, PETITIONER

v.

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

SIMON E. SOBELOFF,
Solicitor General,
J. LEE RANKIN,
Assistant Attorney General,
OSCAR H. DAVIS,
WILLIAM H. VEEDER,
Special Assistants to the Attorney General,
Department of Justice,
Washington 25, D. C.

WILLARD W. GATCHELL,
General Counsel,
JOHN C. MASON,
LOUIS C. KAPLAN,
Attorneys,
Federal Power Commission,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	4
The Pelton Project	4
Proceedings before the Commission	7
Proceedings before the Court of Appeals	11
Summary of argument	14
Argument:	
Introduction	20
I. The Desert Land Act of 1877 and related acts pertain only to public lands, not to reserved lands of the United States such as are here involved	25
A. Reserved lands are not public lands	25
B. The Desert Land Act (and related legislation) applies only to public lands	26
C. The Pelton dam lands are reserved lands and not public lands	29
II. Assuming the Desert Land Act of 1877 and related Acts are applicable to reserved lands, they did not constitute an irrevocable surrender of the rights of the United States in non-navigable streams traversing its lands, so as to authorize a State to bar a federal hydroelectric project like the Pelton Project	31
III. The United States is the owner of the unused and unappropriated rights to the use of water for the generation of electricity at the point on the Deschutes River where the Pelton dam and plant would be constructed	43

328979—55——1

Argument—Continued

III. The United States is the owner of, etc.—Con. Page

A. Title to the rights to the use of unappropriated water in a non-navigable stream on federal land resides in the United States 44

B. The unappropriated right to use the waters of the Deschutes River to generate electricity is a real property right 50

IV. There are additional reasons why Oregon cannot bar the Pelton Project 53

Conclusion 57

Appendix A, Statutory Provisions 58

Appendix B, Map 73

Appendix C, Map 74

CITATIONS

Cases:

Alabama v. *Texas*, 347 U. S. 272 35

Anderson v. *Bassman*, 140 Fed. 14 48

Anthony v. *Veatch*, 189 Ore. 462 ..... 30, 55

Arizona v. *California*, 283 U. S. 423 23

Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288 ..... 19, 51

Bean v. *Morris*, 159 Fed. 651, affirmed, 221 U. S. 485 ..... 19, 47

Broder v. *Natoma Water and Mining Co.*, 101 U. S. 274 34

Brown v. *Baker*, 39 Ore. 66 48

Butte City Water Co. v. *Baker*, 196 U. S. 119 40

California Oregon Power Co. v. *Beaver Portland Cement Co.*, 295 U. S. 142 ..... 12, 15, 17, 29, 32, 36, 37, 40, 44, 45

Cameron v. *United States*, 148 U. S. 301 25

Camfield v. *United States*, 167 U. S. 518 ..... 23, 33

Comstock, Exec. v. *Olney Springs Drainage Dist.*, 97 Colo. 416 52

Conrad Investment Co. v. *United States*, 161 Fed. 829 ..... 19, 47

Cruse v. *McCauley*, 96 Fed. 369 48

Cases—Continued

	Page
Davis v. *Randall*, 44 Colo. 488	52
Federal Power Commission v. *Idaho Power Co.*, 344 U. S. 17	23
First Iowa Hydro-Electric Coop. v. *Federal Power Commission*, 328 U. S. 152	11, 17, 41
Gibson v. *Chouteau*, 13 Wall. 92	23
Hough v. *Porter*, 51 Ore. 318	18, 45, 46, 48, 49, 52
Howell v. *Johnson*, 89 Fed. 556	45, 46, 48
Hunt v. *United States*, 278 U. S. 96	23
Hynes v. *Grimes Packing Co.*, 337 U. S. 86	22
Jennison v. *Kirk*, 98 U. S. 453	33
Kansas v. *Colorado*, 206 U. S. 46	36
Leavenworth, Lawrence and Galveston R. R. Co. v. *United States*, 92 U. S. 733	25, 33
Light v. *United States*, 220 U. S. 523	23
Lindsey v. *McClure*, 136 F. 2d 65	52
Minnesota v. *Hitchcock*, 185 U. S. 378	29
Minnesota v. *United States*, 305 U. S. 382	22
Morgan v. *Shaw*, 47 Ore. 333	18, 46, 48
Nevada Ditch Co. v. *Bennett*, 30 Ore. 59	18, 46–47, 48
Shannon v. *United States*, 160 Fed. 870	29
State of Iowa v. *Federal Power Commission*, 178 F. 2d 421, certiorari denied, 339 U. S. 979	57
State of Oregon v. *Federal Power Commission*, 211 F. 2d 347	11
State of Washington Dept. of Game v. *Federal Power Commission*, 207 F. 2d 391, certiorari denied, 347 U. S. 936	24
United States v. *California*, 332 U. S. 19	23
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53	19, 54
United States v. *City and County of San Francisco*, 310 U. S. 16	23, 35
United States v. *Conrad Investment Co.*, 156 Fed. 123	29
United States v. *Hanson*, 167 Fed. 881	40
United States v. *McIntire*, 101 F. 2d 650	19, 26, 29, 30, 47, 54
United States v. *Minnesota*, 270 U. S. 181	22, 25, 29
United States v. *O'Donnell*, 303 U. S. 501	25

Cases—Continued Page

United States v. *Oregon*, 295 U. S. 1 23
United States v. *Rickert*, 188 U. S. 432 22
United States v. *Rio Grande Irrigation Co.*, 174 U. S. 690 ..... 17, 23, 29, 34, 49
United States v. *Utah*, 283 U. S. 64 22
United States v. *Utah Power & Light Co.*, 209 Fed. 554, affirmed, 243 U. S. 389 ..... 33, 34
United States v. *Walker River Irr. Dist.*, 104 F. 2d 334 ..... 19, 29, 47, 54
United States v. *Winans*, 198 U. S. 371 54
Utah Power & Light Co. v. *United States*, 243 U. S. 389 23
Williams v. *Altnow*, 51 Ore. 275 48
Winters v. *United States*, 143 Fed. 740, affirmed, 207 U. S. 564 ..... 17, 19, 26, 29, 30, 35, 36, 47, 50, 54
Wisconsin Central R. Co. v. *United States*, 164 U. S. 190 33

U. S. Constitution, Federal Statutes, Treaty, and State Constitution and Statutes:

U. S. Constitution, Art. IV, § 3, Cl. 2 ..... 22, 35
Act of August 14, 1848, 9 Stat. 323, 328, secs. 1 and 12, establishing the Territorial Government of Oregon 30, 55, 67
Act of July 26, 1866, 14 Stat. 251, 43 U. S. C. 661:
Sec. 1 39
9 ..... 12, 18, 28, 40, 65
Act of July 9, 1870, 16 Stat. 218, 43 U. S. C. 661:
Sec. 17 ..... 12, 18, 28, 65
Act of June 3, 1878, c. 151, 20 Stat. 89, 43 U. S. C. 311 35
Act of March 3, 1891, c. 561, sec. 18, 26 Stat. 1101, 43 U. S. C. 946 35
Act of June 4, 1897, c. 2, 30 Stat. 36, 16 U. S. C. 481 35
Act of June 11, 1906, c. 3074, sec. 3, 34 Stat. 234, 16 U. S. C. 508 35
Act of June 25, 1910, 36 Stat. 847, 43 U. S. 141, 142 ..... 5, 30, 35

U.S. Constitution, Federal Statutes, Treaty, etc.—Con. Page
Act of June 25, 1910, 36 Stat. 855 5
Admission Act of Oregon into the Union, Act of February 14, 1859, Ch. 33, Sec. 4, 11 Stat. 383, 384 ..... 52, 55, 67
Desert Land Act of 1877, 19 Stat. 377, 43 U. S. C. 321:
Sec. 321 ..... 12, 15, 18, 26, 31, 34, 64
Federal Power Act, 49 Stat. 838, as amended, 16 U. S. C. 791a, *et seq.*:
Sec. 3 (1) 15, 26, 58
3 (2) 15, 26, 58
3 (8) 4, 58
4 (e) 4, 59
9 (b) 9, 42, 61
10 (a) 61
24 ..... 6, 31, 35, 61
27 63
Wildlife Resources Act of August 14, 1946, 60 Stat. 1080, 16 U. S. C. 661:
Sec. 2 56
Treaty of June 25, 1855, establishing Warm Springs Indian Reservation, 12 Stat. 963 ..... 5, 55
Oregon Constitution of 1859, Art. XVIII, Sec. 7 ..... 30, 55, 68
Acceptance of Propositions, 9 Oregon Compiled Laws Annotated, pp. 75, 76 ..... 52, 55, 68
Fish and Game Code of the State of Oregon (5 O. C. L. A. §§ 83-314 and 83-316):
Sec. 83-314 ..... 8, 69
Sec. 83-316 ..... 8, 71
2 Oregon Compiled Laws Ann. 16-402 52
8 Oregon Compiled Laws Ann., Sec. 116-606 52
Water Code of the State of Oregon (8 O. C. L. A. § 116-401, 116-402 (1944-1947 Secondary Pocket Part), 119-102, 119-103:
Sec. 116-401 68
Sec. 116-402 68
Sec. 119-102 ..... 8, 68
Sec. 119-103 ..... 8, 69

Miscellaneous: Page

Executive Order of July 2, 1910 5
Executive Order of October 8, 1913 5
Farnham, *Waters and Water Rights*, Vol. 3, Sec. 662, p. 2054 49
Gould, *Waters* (3d Ed.) Sec. 473, *et seq* 49
H. Rep. No. 1944, 79th Cong., 2d Sess., p. 3 57
Kinney on *Irrigation*, Sec. 124 25
Kinney on *Irrigation and Water Rights*, Vol. 1, 2d ed., sec. 411, pp. 692–3 ..... 25, 40, 48
Kinney on *Irrigation and Water Rights*, Vol. 2, 2d ed., sec. 638, p. 1118 53
Pomeroy, *Water Rights* (Black ed., 2d Ed.), Sec. 22 49
19 Rocky Mountain Law Review 63 52
Wiel, *Water Rights in the Western States*, (3d ed.):
Sec. 18 51
Sec. 185, *et seq* 49
Sec. 283 51
Sec. 285 51

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 367

FEDERAL POWER COMMISSION, PETITIONER

v.

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The majority and dissenting opinions in the United States Court of Appeals for the Ninth Circuit (R. III, 1033–1044) are reported in 211 F. 2d 347. The opinion and order of the Federal Power Commission granting the license (R. II, 417–447) are reported at 92 P. U. R. (N. S.) 247.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1954 (R. III, 1045). A timely petition for rehearing was denied on April

28, 1954 (R. III, 1045). On July 23, 1954, Mr. Justice Black extended the time within which to file a petition for a writ of certiorari to and including September 25, 1954 (R. III, 1046). On September 24, 1954, the petition for a writ of certiorari was filed and it was granted on November 8, 1954 (R. III, 1046). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1) and Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. 825*l*).

QUESTIONS PRESENTED

1. Whether by reason of the Desert Land Act of 1877, and related legislation, the United States has irrevocably surrendered to the western States its powers over non-navigable waters on Government-owned lands within those States, so that the States may exercise their police power to control and regulate use of, and rights to, the waters on such lands in a manner contrary to that directed by the Federal Power Commission—in a case where the stream would continue to flow undiminished from the federal lands and there would be no impingement upon or interference with any vested or inchoate rights to the use of water.

2. Whether, in any event, the Desert Land Act and related legislation applies in such circumstances to Government lands which are not "public lands" but have been reserved for power purposes.

3. Whether the refusal of the Fish and Hydroelectric Commissions of the State of Oregon to issue permits for a project of the character described in the preceding questions can prevent the construction of that project, although (a) the Federal Power Commission has granted a license for its construction upon lands reserved by the United States for power purposes; and (b) the lands were reserved by the United States for the Indians before 1877 and for power-site purposes many years before Oregon enacted its regulatory laws for the protection of fish in State waters and for the licensing of water-power projects.

4. Whether the United States is the owner of unused and unappropriated rights to the use of water available for the generation of electricity in a non-navigable stream traversing its lands reserved by it for power purposes.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act (49 Stat. 838, 16 U. S. C. 791a, *et seq.*); of the Desert Land Act and related legislation (19 Stat. 377, 43 U. S. C. 321; 14 Stat. 253, 43 U. S. C. 661; 16 Stat. 218, 43 U. S. C. 661); of the Act of Congress establishing Oregon as a territory and providing for its admission to the Union (9 Stat. 323, 328); of the Admission Act of Oregon (11 Stat. 383, 384); of Oregon's Acceptance of Propositions (9 O. C. L. A. pp. 75, 76); and of the Constitution and Laws of Oregon (Art. XVIII,

Sec. 7, Constitution of Oregon, 1859; Sections 83–314, 83–316, 116–401, 116–402, 119–102, 119–103, 8 O. C. L. A.), are set forth in Appendix A, *infra*, pp. 58–72.

STATEMENT

The Pelton Project: The Federal Power Commission, by an order issued December 21, 1951 (R. II, 417–447), granted under Part I of the Federal Power Act a license to the Portland General Electric Company,[1] pursuant to which that Company would be permitted to construct, operate, and maintain a hydroelectric plant known as the Pelton Project No. 2030 on reserved lands of the United States.

The principal structure of that Project is an on-channel dam across the Deschutes River in the State of Oregon.[2] The western terminus of the

[1] The original application was filed by the Northwest Power Supply Company of Portland on May 23, 1949, for a license under section 4 (e) of the Federal Power Act, 16 U. S. C. 797 (e). On June 15, 1951, a supplemental application was filed by the Northwest Power Supply Company and Portland General Electric Company requesting that the license be granted to the latter (R. II, 418).

[2] See location maps, Appendices B and C, *infra*, pp. 72–73. The Deschutes River drains the eastern slope of the Cascade Range flowing northward across the lands of the United States here involved, emptying into the Columbia River about 15 miles upstream from The Dalles, Oregon.

The Commission made no findings as to the navigability of the Deschutes River at the site of the project. For purposes of this case, therefore, it is assumed that the Deschutes River is not "navigable waters" of the United States as defined in Section 3 (8) of the Federal Power Act (16 U. S. C. 796 (8)).

dam would be the lands within the Warm Springs Indian Reservation (the title to which is in the United States) and the eastern terminus would be lands the title to which is and has been in the United States since the cession by Great Britain of the area now comprising the State of Oregon. See *infra*, pp. 29–30. The Warm Springs Indian Reservation was established by treaty in 1855.[3] There was secured to the Indians by that treaty "the exclusive right of taking fish in the streams running through and bordering said reservation" (12 Stat. 964). The Warm Springs Indians have consented to the construction of the Pelton Project (R. III 1043).

All of these lands were withdrawn many years ago for power purposes. Those in the Warm Springs Indian Reservation were withdrawn for that purpose in the year 1910,[4] Those on the east side were withdrawn from entry, location, or disposal under the public land laws and were reserved for power purposes in the years 1909[5], ~~and 1913.[6]~~

---

[3] Treaty of June 25, 1855, with Indians in Middle Oregon establishing Warm Springs Indian Reservation, 12 Stat. 963.

[4] Indian Power Site Reserve No. 2, created November 1, 1910, by the Secretary of the Interior pursuant to Act of June 25, 1910, 36 Stat. 855.

[5] Power Site Reserve No. 66, created December 30, 1909, by order of the Secretary of the Interior, made permanent by Executive Order of July 2, 1910, pursuant to Act of June 25, 1910, 36 Stat. 847.

[6] Power Site Reserve No. 294, created by ~~Executive Order of October 6, 1913~~, pursuant to the Act of June 25, 1910, 36

As proposed, the dam of the Project would be of concrete with a height of approximately 205 feet (R. III 1034). The power plant to be built in connection with it would contain three 36,000 kilowatt generators (R. III 1034). At the point on the Deschutes River where the power dam and plant would be constructed there is available for the generation of electricity rights to the use of water which are unappropriated and unused. Those unexercised rights and the currently wasted head of water at the site of the power dam would be beneficially used to generate electricity which would aid in meeting the severe power shortage which has been found by the Commission to exist (*infra*, pp. 9–10, 42–43).

It is admitted that there will be no diversion of water from the Deschutes River by the Pelton Project; rather, the water will flow undiminished through or over the dam, continuing down the natural bed of the stream (R. III 1034). The

---

Stat. 847. There was a further reservation of the lands on the east side of the river involved in the Pelton project upon the filing of an application for license for Project No. 57 in 1920, and upon the filing of an application for the Pelton project, since Section 24 of the Federal Power Act (Appendix A, *infra*, pp. 61–63), in pertinent part, provides:

> Any lands of the United States included in any proposed project under the provisions of this Part shall, from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress.

Project will not interfere with, invade, or encroach upon any rights to the use of water in the stream. The waters impounded by the power dam will create a relatively narrow reservoir five or six miles long in mountainous terrain. The reservoir will submerge lands situated in the Warm Springs Indian Reservation and other lands title to which is in the United States. In some minor instances, there will also be submerged lands title to which has passed from the United States.

Another feature of the Pelton Project is a "re-regulating" dam to be constructed three miles below the power dam on lands neither owned nor controlled by the Federal Government. Its sole purpose is to equate the flow of water released from the power dam. No use of the waters of the Deschutes River will be made by or at the "re-regulating" structure nor is there objection directed to it.

Proceedings Before the Commission: Objections to the granting of the license by the Federal Power Commission to the Portland General Electric Company for the Pelton Project were registered by the State of Oregon, the Fish Commission of Oregon, the Oregon State Game Commission, and the Oregon Division of the Izaak Walton League (R. II, 324–325, 418). It was charged in the objections that the proposed power dam would prevent the ascent of anadromous fish to their spawning ground above the dam site, resulting in serious cur-

tailment of the fish population, preventing its increase and impairing the productivity and usefulness of the State fish hatchery on the Metolius River, a tributary of the stream in question. It was further contended that the Federal Power Commission was without authority to grant the license since the applicant had failed to obtain a permit from the Hydroelectric Commission of Oregon[7] and had not complied with the Oregon law as to fish in the river,

[7] In 1931, Oregon enacted legislation providing for the licensing of the construction and operation of water-power projects by its Hydroelectric Commission and forbade the appropriation and use of the waters of the lakes, rivers, streams, or other bodies of water within the State of Oregon, including waters over which the State has concurrent jurisdiction, in connection with the development of any water-power project for the generation of electricity and the construction of water-power projects in such waters, except in accordance with a license issued by the State commission (8 O. C. L. A. Secs. 119–102, 119–103, Appendix A, *infra*, pp. 68–69).

In 1921, Oregon adopted legislation declaring unlawful the construction or maintenance of dams in streams "frequented by salmon or other food fish" without "a passageway for such fish over such obstructions" (5 O. C. L. A. Sec. 83–314, Appendix A, *infra*, pp. 68–70), and providing for the issuance of permits by the Oregon Fish Commission for the construction of dams "to a height that will make a fish ladder or fishway thereover impracticable" upon condition that the applicant shall first convey to the State a site for the erection of a hatchery as specified by the Fish Commission, erect the hatchery according to plans and specifications furnished by that commission, and agree to furnish water and light, at no expense to the State, to operate the hatchery (5 O. C. L. A. Sec. 83–316, Appendix A, *infra*, pp. 70–71).

as said to be required by Section 9 (b) of the Federal Power Act.[8]

After the hearings, the Presiding Examiner issued a recommended decision, subject to Commission review, granting a license for the construction, operation, and maintenance of the Pelton Project (R. II, 321–390).

On December 21, 1951, the Federal Power Commission issued an opinion (No. 222) and order granting a license for the construction, operation, and maintenance of the Pelton Project. In its opinion, the Commission referred to the "severe power shortage" in the Pacific Northwest as being a matter of national concern and that additional generating plants must be built. It made particular reference to the fact that the planned Federal power construction would not meet the severe shortage of power within the region. (R. II, 422.) Further, the Commission declared that its analysis of the evidence disclosed that the

[8] Sec. 9 (b) of the Federal Power Act, 41 Stat. 1068, 16 U. S. C. 802 (b): "That each applicant for a license hereunder shall submit to the commission—

"(a) * * *

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act." (Appendix A, *infra*, p. 61.)

Pelton Project was in the public interest and would provide for comprehensive development of the affected stretch of the Deschutes River (R. II, 427).

Certain specified conditions were included in the license. Particularly important is the requirement that the Pelton Project would be subject to all existing rights, whether or not perfected, to the use of the waters of the Deschutes River and its tributaries (R. II, 443–444). The Commission likewise imposed, as a condition to the granting of the license, the requirement that there be constructed fishery facilities that will maintain the population of anadromous fish "during the construction period [of the Project] and thereafter" (R. II, 445). The Commission reviewed in some detail the extensive facilities which would be installed and the practices which would be adopted by the licensee to fulfill the conditions of the license respecting the maintenance of the anadromous fish population (R. II, 420 *et seq.*).

An application was filed with the Commission for a rehearing by the State of Oregon, the Oregon Fish Commission, and the Oregon State Game Commission. That application was denied by the Commission on February 29, 1952. (R. II, 481, 482.) Following that denial, a petition was filed for review in the United States Court of Appeals for the Ninth Circuit, as authorized by

Section 313 (b) of the Federal Power Act (R. II, 495–496).

Proceedings Before the Court of Appeals: On February 19, 1954, the Court of Appeals (per Stephens, Orr, JJ) set aside the Commission's order issuing the license for the Pelton Project. Judge Healy dissented. *State of Oregon* v. *Federal Power Commission,* 211 F. 2d 347, 354. The majority declared that it is incontrovertible that a license from the Federal Power Commission is necessary for the construction of the Pelton Project, because the Project would occupy lands of the United States, and Congress has conferred the licensing power upon the Commission under those circumstances. The issue in the case, the Court of Appeals stated, was the extent of the right which the federal license carries or purports to carry with it (R. III, 1036). In considering that issue, the court first alluded to Section 9 (b) of the Federal Power Act (fn. 8, *supra,* p. 9) by reason of which the State of Oregon and its agencies urged that the Commission has no authority to grant a license unless the licensee has shown compliance with all applicable State laws. The answer, the Court of Appeals stated (R. III, 1036), was that the application of this section "has been negatived" by a decision of this Court (*First Iowa Hydro-Electric Coop.* v. *Federal Power Commission,* 328 U. S. 152). However, that conclusion did not destroy the case of the ob-

jectors to the license. They rely, the Court of Appeals declared, upon the more fundamental claim that the Deschutes River is a State stream and the State of Oregon has sovereign power over it and its waters (R. III, 1037). The court referred to the fact that Congress, in the exercise of its constitutional powers over the large tracts of Western land title to which then resided in the United States, had adopted the Acts of 1866, 1870 and the Desert Land Act of 1877, respecting the waters arising on or traversing those lands (43 U. S. C. 321; 43 U. S. C. 661 (Appendix A, pp. 64–65); R. III, 1038–39). Particular emphasis was placed by the Court of Appeals on the Desert Land Act of 1877. It held that the Deschutes River flows from and partially through lands to which that Act applies. It likewise referred to the laws of the State of Oregon enacted in the year 1909 providing that all waters within the State of Oregon from all sources of water supply belong to the public; to the Act establishing the territorial government; to the constitutional provisions of Oregon continuing in force consistent territorial laws; and to the statutes providing for the conservation of fish life (R. III, 1039). The court then considered several decisions of this Court reviewing and construing the Desert Land Act of 1877, particularly the case of *California Oregon Power Company* v. *Beaver Portland Cement Company*, 295 U. S. 142 (R. III, 1039).

It was concluded, based on that review, that any limitation upon Oregon's complete sovereignty over the waters of the Deschutes River, as they flowed over lands of the United States, was wiped out by the Desert Land Act of 1877. Further, the regulation of the river pursuant to the State's sovereignty was held to include regulatory powers as to fish in its waters. Consequently, it was the opinion of the majority of the Court of Appeals that the Commission in granting the license for the Pelton Project "trenched upon the sovereignty of the State of Oregon * * *." Continuing the Court declared, "It is true that the Commission has gone a long way toward minimizing the harm which may result from the construction and operation of the Project. * * * The fundamental principle, however, is not whether the Project will cause large, small, or any damage. It is that Oregon has the right to regulate its own waters in its own chosen way." Thus the order issuing the license was set aside (R. III, 1040–1041).

Judge Healy, dissenting, emphasized that the Desert Land Act and related Acts pertain only to public lands, and have no application to "* * * the stretch of the Deschutes affected, including its bed and banks, [which] is entirely on reserved lands which have been severed from the public domain and appropriated to a public use" (R. III, 1041–42). The dissent pointed out that the United States has not consented to State control

of the fishing resources in the waters of the Deschutes River on lands reserved by it for power purposes or reserved for the Warm Springs Indians (R. III, 1042).

The dissent concluded: "But these considerations apart, the First Iowa case, 328 U. S. 152, makes it crystal clear that state laws or objections cannot stand as a legal bar to federal authorization of a power project which is within federal competence and which, in the judgment of the Commission, will be in the public interest and will meet the standards specified in the Federal Power Act for comprehensive power development" (R. III, 1044).

SUMMARY OF ARGUMENT

The United States admittedly owns the land on which the power dam is to be built, including the bed of the Deschutes River and the lands of the Indian reservation. It is beyond dispute that, unless Congress has consented or granted its interest, the State cannot interfere with the regulation or use by the Federal Government of its lands, their waters, and resources. Here, there has been no such consent or grant, and federal rights in the land and the use of the water are still controlling.

I

Respondents and the court below have found a grant of rights to the use of the Deschutes' waters in the Desert Land Act of 1877 and its

precursor Acts of 1866 and 1870, dealing with water rights in the western States. But this legislation pertains only to "public lands", not to reserved lands of the United States such as are here involved.

A. The only federal lands falling within the category of "public lands" are those which are subject to private sale and disposition; lands reserved for special purposes like power development or Indian use, and not available for disposition, are not public. This has been the consistent holding of this Court and the lower federal courts, including the Ninth Circuit. In the Federal Power Act Congress adopted the same definition. Section 3 (1), (2), 16 U. S. C. 796 (1) (2), *infra*, p. 58.

B. As their terms show, the Desert Land Act of 1877 and its forerunners apply only to "public lands." These statutes were enacted "to further the disposition and settlement of the *public domain*" (*California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 161, emphasis added), and, concerning as they do the rights of private possessors, appropriators, and entrymen, they have uniformly been interpreted as operative only with respect to public lands.[9]

[9] The provision of the Desert Land Act on which reliance is mainly put provides that "all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the *public lands* and not navigable, shall remain and be held

C. The Pelton project lands are reserved and not public lands. Those on the west bank of the Deschutes River have long been set aside for, and occupied by, the Warm Spring Indians. The lands in the east bank have for several decades been definitively reserved for power purposes.

II

Even if it be assumed that they apply to reserved lands, the Desert Land Act and the earlier statutes did not constitute an irrevocable surrender of the rights of the United States in non-navigable streams traversing its lands, so as to authorize a state to bar a federal hydroelectric project like the Pelton Project.

A. The legislation contains no words of grant or dedication *to the States* but merely constitutes a policy reservation of the waters of federal lands to the public for private appropriation (see fn. 9, *supra,* p. 15), subject to change by Congress (without disturbing existing individual rights) in the exercise of its constitutional power over federal property. To expand this limited declaration into an unrevocable surrender to the States of all the rights of the United States would run counter to settled doctrine in federal property law.

---

free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." [Emphasis added.]

B. Refusing to read the legislation as a surrender to the States, this Court has twice held it subject to drastic modification by later enactments and policies. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690; *Winters* v. *United States*, 207 U. S. 564. *California Oregon Power Company* v. *Beaver Portland Cement Company*, 295 U. S. 142, is said to lean the other way, but that decision (a) applies in terms only to public lands, and (b) even as to such lands, holds merely that private appropriators can acquire rights to the use of water from the United States by following the provisions of State law. In this respect, the water statutes are parallel to the federal mining laws which provide for private acquisition of mining rights under State law but plainly retain full control in Congress.

C. On this view, the Desert Land Act cannot affect the Pelton Project, for the Project will interfere with no preexisting rights and will leave the flow of water undiminished for future use. Federal control therefore continues and, as this Court has already held, the Federal Power Act establishes full supremacy in its field of operation, leaving no room or need for conflicting state controls. *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U. S. 152.

III

The Federal Government's powers of regulation and control—unaffected by the Desert Lan

Act (and related statutes)—are enough to sustain the exclusive authority of the Federal Power Commission over the Pelton Project. But there is an additional reason for this conclusion—the United States is the *owner* of the unused and unappropriated rights to the use of the water available for the generation of electricity in the Deschutes River at the project site.

A. The United States received title to the lands and the rights to use the water involved in the Pelton Project when the land which is now Oregon became part of the United States. The discussion in Point II, *supra,* shows that the Acts of 1866, 1870, and 1877 did not divest the Federal Government of title to the rights to the *unappropriated* water in non-navigable streams, but ~~was~~ were Federal authority for the acquisition of unappropriated rights to the use of water, establishing the means for that acquisition. Once the requirements for appropriation are thus accomplished, title passes from the Federal Government to the appropriator. Oregon is in full accord with this rule, and its Supreme Court explicitly holds that unappropriated water rights belong to the United States. *Nevada Ditch Co.* v. *Bennett,* 30 Ore. 59, 104; *Morgan* v. *Shaw,* 47 Ore. 333, 337; *Hough* v. *Porter,* 51 Ore. 318, 389.

The Ninth Circuit, on numerous occasions, has also rendered opinions supporting the conclusion that the United States is the owner of the unap-

propriated rights to the use of water and may reserve those rights without regard to State law. *United States* v. *McIntire,* 101 F. 2d 650, 654 (C. A. 9); *United States* v. *Walker River Irr. Dist.,* 104 F. 2d 334, 336–337 (C. A. 9); *Winters* v. *United States,* 143 Fed. 740, 747 (C. A. 9), affirmed, 207 U. S. 564; *Conrad Investment Co.* v. *United States,* 161 Fed. 829 (C. A. 9); *Bean* v. *Morris,* 159 Fed. 651, 654 (C. A. 9), affirmed, 221 U. S. 485. Similarly, decisions of federal district courts support that conclusion, *infra,* p. 47.

B. The unappropriated right to use the waters of the Deschutes River to generate electricity is an interest in real property title to which is in the United States. *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 73; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 330. Oregon likewise recognizes rights of this type.

IV

Even if the contentions presented in the preceding Points are not accepted, there are two additional reasons why Oregon's objection to the Pelton Project cannot stand.

A. Under the Indian Treaty of 1855, giving the Warm Springs Indians the "exclusive right of taking fish in the streams running through and bordering" their reservation—a treaty which Oregon recognizes as binding—the United States as trustee for the Indians, not the State, have power

of control over the fishing resources of the Deschutes River in the Pelton area. The Indians have consented and therefore Oregon cannot object, as it has, to interference with alleged State fishery resources.

B. More generally, our position is that, whatever else be the effect of the Desert Land Act, it does not include recognition of the primacy of State fish regulations. The Act and its forerunners concern only irrigation and similar activities. Other federal legislation deals specifically with conservation of wildlife and fish and indicates that full federal control is still maintained in that area.

ARGUMENT

INTRODUCTION

The court below recognized that the Federal Power Commission had the legal right to give its approval to the Pelton Project and that the Commission had authority to grant its permissive license for the construction of the power dam and plant upon the reserved lands of the United States (R. III 1036). The court denied, however, that the licensee can, without compliance with State law, utilize for the generation of greatly needed electricity the unappropriated head of water flowing in the Deschutes River over and across the reserved lands of the United States at the site of the dam, or the unappropriated head of water which would be created by

storage behind the dam. The Desert Land Act of 1877 and related acts, the court declares, constituted a cession of sovereignty to the States over those unappropriated rights to the use of water on federal lands, and that cession "includes regulatory powers as to fish in state waters" (R. III 1040). Accordingly, in the court's view, "the Commission has trenched upon the sovereignty of the State of Oregon" (R. III 1040).

For that reason, the court attributed no weight to the facts:

> (a) that the licensee would be required (at the insistence of the Oregon Fish Commission) at great cost to include in the project the re-regulating dam to equate the flow of the stream (*supra*, p. 7);
>
> (b) that the licensee would be likewise required at great cost to provide facilities for the conservation of anadromous fish;[10]
>
> (c) that there is no conflict between the utilization of the presently wasted head of water at the Pelton power dam and any other rights to the use of water in the Deschutes River, either vested or inchoate.

The opinion flatly declares: "It is true that the Commission has gone a long way toward minimiz-

---

[10] R. II, 420, 506, 507. The total cost for the re-regulating dam and the facilities for the preservation of the anadromous fish would be at least $4,430,000; an annual cost of money, depreciation and taxes on capital investment of $410,000; a cost of $10,000 a year to operate and maintain the re-regulating dam. The company has, moreover, offered to pay $100,000 a year as its share of the operation and maintenance cost of the facilities for the conservation of fish.

ing the harm which may result from the construction and operation of the Project. * * *. The fundamental principle, however, is not whether the Project will cause large, small, or any damage. It is that Oregon has the right to regulate its own waters in its own chosen way." (R. III 1040–41.)

But the basic fact is that the United States admittedly owns the land on which the major dam is to be built, including the bed of the non-navigable Deschutes River [11] and the lands of the Indian reservation (*United States* v. *Rickert,* 188 U. S. 432; *United States* v. *Minnesota,* 270 U. S. 181; *Minnesota* v. *United States,* 305 U. S. 382; *Hynes* v. *Grimes Packing Co.,* 337 U. S. 86). The constitutional provision under which the Commission, as the agent of Congress, is authorized to issue licenses for power projects on such lands is article IV, section 3, clause 2:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

The power over the lands of the United States thus entrusted to Congress is without limitation and it may constitutionally limit the use or dis-

[11] It is settled that title to the bed of non-navigable streams in the western states traversing lands of the United States remains in the United States after admission of the State to the Union. *United States* v. *Utah,* 283 U. S. 64, 75; *United States* v. *California,* 332 U. S. 19.

position of those lands in a manner consistent with its views of public policy. *United States* v. *California*, 332 U. S. 19, 27; *United States* v. *City and County of San Francisco*, 310 U. S. 16, 29; *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 21.

It is equally clear that, in the absence of federal legislation authorizing State action, such Government-owned property is immune from regulation or control by the State; properly authorized federal agencies may use and regulate the land, as well as its waters and resources, without regard to State regulatory laws. E. g., *Camfield* v. *United States*, 167 U. S. 518, 526; *Light* v. *United States*, 220 U. S. 523; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *Hunt* v. *United States*, 278 U. S. 96, 100; *Arizona* v. *California*, 283 U. S. 423, 451–2; *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 703; *Gibson* v. *Chouteau*, 13 Wall. 92; *United States* v. *Oregon*, 295 U. S. 1, 27–29. If that were not the rule, the properties of the United States, particularly in the semi-arid West, would be "completely at the mercy of state legislation." *Camfield* v. *United States, supra.* Therefore, unless, as the Ninth Circuit has held, the Desert Land Act granted plenary authority to the western States over such lands and waters as those involved here, the State of Oregon can have no foundation for its claim of control.

A major portion of this brief will be devoted to showing the cardinal errors in the Court of Appeals' holding that the Desert Land Act did constitute such a cession of sovereignty by the United States to the States over non-navigable streams traversing reserved federal lands, like the stretch of the Deschutes River in controversy. We shall point out that (a) the Desert Land Act and related legislation pertain only to "public lands," not to reserved lands, (b) even if those statutes do apply in general to reserved lands, they do not authorize a State to prevent construction on reserved lands of a power project like the Pelton Project, authorized under Part I of the Federal Power Act,[12] and (c) in any case, there are additional reasons why the State cannot prevent, upon the grounds given by it, the particular power project proposed in this case. In the course of our argument we shall also maintain that the United States is the owner of unused and unappropriated rights to the use of water available for the generation of electricity in a non-navigable stream traversing its lands reserved for power purposes.

---

[12] In *State of Washington Dept. of Game* v. *Federal Power Commission*, 207 F. 2d 391, certiorari denied, 347 U. S. 936, the Ninth Circuit recently held that, where the Commission's authority to license stems from the navigability of the stream, its authority is not subject to State police power with respect to fish. If the present decision is affirmed, the relationship of federal hydro-electric projects to State regulatory laws will apparently depend on whether the Commission's authority rests on proposed occupancy of Government lands (as in this case) or on the navigability of the stream (as in the *State of Washington* case).

I

THE DESERT LAND ACT OF 1877 AND RELATED ACTS PERTAIN ONLY TO PUBLIC LANDS, NOT TO RESERVED LANDS OF THE UNITED STATES SUCH AS ARE HERE INVOLVED

A. *Reserved lands are not public lands.*—This Court has repeatedly held that lands of the United States which are reserved are severed from the public lands.[13] In *United States* v. *O'Donnell*, 303 U. S. 501, 510, the Court said: "It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose." There has been consistent judicial acceptance of that principle. See e. g., Kinney on *Irrigation*, Sec. 124. The Ninth Circuit's own prior decisions have, until the present opinion, adhered to the proposition that lands reserved by the United States are not subject to the statutes relating to public lands made available for sale or disposition. To the contention that the Act of 1866 (*infra*, pp. 65–66) authorized the appropriation of rights to the use of water within an Indian Reservation pursuant to the laws of the State of Montana, the Court of Appeals replied: "That

[13] *United States* v. *Minnesota*, 270 U. S. 181; *Leavenworth, Lawrence and Galveston R. R. Co.* v. *United States*, 92 U. S. 733, 742; *Cameron* v. *United States*, 148 U. S. 301, 309–310; *United States* v. *O'Donnell*, 303 U. S. 501, 510, and cases cited.

statute, however, applies only to 'public' lands." *United States* v. *McIntire,* 101 F. 2d 650, 653, 654. This conclusion was simply a reaffirmation of an earlier decision by that court on the same subject. *Winters* v. *United States,* 143 Fed. 740, 747, affirmed, 207 U. S. 564.

The Congress in passing the Federal Power Act ascribed to the term the same connotation which has been adopted by this Court. That Act specifically states (16 U. S. C. 796 (1), (2); Appendix A, *infra,* p. 58) that " 'public lands' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations', as hereinafter defined; (2) 'reservations', means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; * * *."

B. *The Desert Land Act (and related legislation) applies only to public lands.*—The Desert Land Act of 1877 and its forerunners clearly apply only to "public lands" and not to reserved federal lands.

1. The terms of the 1877 Act show on their face that this is so. That Act provides (43 U. S. C. 321; Appendix A, *infra,* pp. 64-65): "It shall be lawful for any citizen of the United States, or

any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to become such' and upon payment of 25 cents per acre—to file a declaration under oath with the officer designated by the Secretary of the Interior of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter:

> *Provided, however,* That the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the *public lands* and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. [Emphasis added.]

Similarly, the express language of the precursor Acts of 1866 and 1870 (43 U. S. C. 661, Appendix A, *infra,* pp. 65–66) removes any doubt that they relate solely to "public lands" subject to disposition under the general acts relating to such lands.

Section 9 of the earlier act provides with respect to *"Appropriation of waters on public lands"*: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." To remove any doubt as to the prospective operation of this provision, the Congress by the Act of 1870 adopted the following amendment: "SEC. 17. *And be it further enacted,* That none of the rights conferred by sections five, eight, and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all *public lands* affected by this act; and all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory." (16 Stat. 217.) [Emphasis added.]

From these explicit terms of the three statutes, it is evident that they concern only "public lands" open for disposition, and not federal lands which are reserved and not available for private sale. The consistent emphasis in the legislation on the rights of private possessors, appropriators, and

entrymen—taken together with the express reference to the "sources of water supply upon the *public lands* and not navigable" (*supra*, p. 27)—proves that this must be the correct reading.

2. And in historical fact this has been the construction uniformly placed upon the legislation by this Court and the lower federal courts (including the Ninth Circuit). See *Winters* v. *United States*, 143 Fed. 740, 747 (C. A. 9), affirmed, 207 U. S. 564; *United States* v. *McIntire*, 101 F. 2d 650, 653, 654 (C. A. 9); (referred to *supra*, p. 26); *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 706; *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 158, 162, 163, 164; *United States* v. *Conrad Inv. Co.*, 156 Fed. 123, 127 (C. C. D. Mont.); *Minnesota* v. *Hitchcock*, 185 U. S. 378, 387. This Court has found the key to these Acts in the fundamental premise that they form an integral part of the intention of Congress "to further the disposition and settlement of the *public domain.*" [Emphasis added.] *California Oregon Power Co.* v. *Beaver Portland Cement Co., supra*, at 161. See also the discussion of the *California Oregon* case, *infra*, pp. 37–41.

C. *The Pelton dam lands are reserved lands and not public lands.*—It is indisputable that the lands involved here are *not* "public lands". Therefore, they are *not* subject to the Desert Land (and earlier) Acts. The lands on the west bank of the Deschutes River within the Warm

Springs Indian Reservation were never a part of the public lands. They belonged to the Indians under the treaty of 1855, long before the Desert Land Act of 1877 was enacted. *United States* v. *Minnesota,* 270 U. S. 181, 206; *Winters* v. *United States,* 143 Fed. 740, 748 (C. A. 9), affirmed, 207 U. S. 564, 577; *United States* v. *McIntire,* 101 F. 2d 650, 653, 654 (C. A. 9); *United States* v. *Walker River Irr. Dist.,* 104 F. 2d 334, 339–340 (C. A. 9); *Shannon* v. *United States,* 160 Fed. 870, 873 (C. A. 9). "The United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians" and "* * * no title to the waters could be acquired by anyone except as specified by Congress." *United States* v. *McIntire, supra,* And it has been said that no "subsequent law or sale should be construed to embrace or operate" upon the lands so reserved. *Winters* v. *United States, supra.*[14]

As pointed out in the Statement (*supra,* p. 5), the portion on the east bank of the Deschutes River was withdrawn from entry, location, or disposal under the public land laws and reserved for power purposes in part in 1909,

---

[14] Oregon law has clearly recognized such treaty rights of the Indians as exempt from State control. Act of August 14, 1848, 9 Stat. 323, Sec. 1 (Appendix A, *infra,* pp. 66–68); Oregon Constitution of 1859, Article XVIII, Sec. 7 (Appendix A, *infra,* p. 68); *Anthony* v. *Veatch,* 189 Ore. 462, 482–485, 220 P. 2d 493, 502–3, 221 P. 2d 575. See also *infra,* pp. 54–55.

and the remainder in 1913, pursuant to the Act of June 25, 1910, 36 Stat. 847.[15] They are therefore not public lands and have not been for several decades.

It is thus manifest that the Court of Appeals committed plain and very significant error when it declared that the Desert Land Act of 1877 and related acts had application to the lands upon which it is proposed to construct the Pelton power dam and power plant. Those Acts do not apply, and none of their provisions can affect the Federal Government's control over the lands or the power of its agent, the Federal Power Commission, effectively to authorize the construction of the Project without the approval of the State.

II

ASSUMING THE DESERT LAND ACT OF 1877 AND RELATED ACTS ARE APPLICABLE TO RESERVED LANDS, THEY DID NOT CONSTITUTE AN IRREVOCABLE SURRENDER OF THE RIGHTS OF THE UNITED STATES IN NON-NAVIGABLE STREAMS TRAVERSING ITS LANDS, SO AS TO AUTHORIZE A STATE TO BAR A FEDERAL HYDROELECTRIC PROJECT LIKE THE PELTON PROJECT

Even if the Desert Land Act (and the earlier statutes) could be read as somehow applying to

[15] The lands on the east bank were also withdrawn from entry and reserved for power purposes by the filing of an application for license in 1920 and by the instant application filed in 1949, as provided by Section 24 of the Federal Power Act. See fn. 6, *supra*, pp. 5–6; Appendix A, *infra*, pp. 61–63.

reserved lands, they would not grant the State of Oregon the power or the title it asserts here.[16]

A. The Ninth Circuit's conclusion that on enactment of the 1877 Act (if not before) there passed to the States the title to all rights to the use of water on federal land expands beyond any reasonable construction the clear import of the language which Congress used. The Act merely declared that "all surplus water over and above such actual appropriation [by the entryman under the Desert Land Act] * * * together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public * * *." *Supra,* p. 27; Appendix A, *infra,* pp. 63–64. The Act contains no words of grant or dedication, and certainly not *to the States.* The most that Congress did was to provide "that all nonnavigable waters [on the land] should be *reserved* for the *use of the public* under the laws of the states and territories named." *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U. S. 142, 162. [Emphasis added.] But reservation for future use by the public, without more, is not synonymous with surrender, deed, or gift to the States (or even to the public) of all the

[16] The States to which these acts relate are: California, Oregon, Nevada, Colorado, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, North Dakota, South Dakota.

rights of the United States in and over the unappropriated waters of federal lands. To expand the limited terms of the Act into such a sweeping and permanent grant—without some clear direction from its terms—would do violence to the well-settled principle that "* * * statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee." *United States* v. *Utah Power & Light Co.*, 209 Fed. 554, 559 (C. A. 8), affirmed, 243 U. S. 389; *Wisconsin Central R. Co.* v. *United States,* 164 U. S. 190; *Camfield* v. *United States,* 167 U. S. 518; *Leavenworth, Lawrence, & Galveston R. R. Co.* v. *United States,* 92 U. S. 733.

There is nothing in the evolution of the 1877 statute which would justify its being read, despite its limited terms, as passing title to the States or as authorizing them to supersede federal regulation. The object of the 1866 and 1870 legislation (*supra,* pp. 27–28) "was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands." It "merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached." *Jennison* v. *Kirk,* 98

U. S. 453, 456–457, 459. When Congress took cognizance of the doctrine of prior appropriation in the semi-arid West by these Acts, it was a "voluntary *recognition of a pre-existing right* * * * [rather] than the establishment of a new one." *Broder* v. *Natoma Water and Mining Co.,* 101 U. S. 274, 276. [Emphasis added.] There was "no grant of specific rights by the Congress of the United States." *United States* v. *Utah Power & Light Co.,* 209 Fed. 554, 560 (C. A. 8). There was only a recognition and assent "to the appropriation of water in contravention of the common law rule" respecting riparian rights. *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 704, 706. Certainly, there are no words of grant or dedication in either of these Acts and, clearly, no general powers of regulation were given to the States. The statutes were concerned solely with private appropriators.

We may add, finally, that since as already noted (*supra,* p. 29) the purpose of the Acts of 1866, 1870, and 1877 was to promote development by private persons of the public lands, there is no reason to read any of the Acts as an irrevocable surrender *to the State* of unappropriated waters, or of full rights of control; or as precluding a beneficial use of appropriated water which does not in any degree impair vested rights. At most, the proviso in the 1877 Act (*supra,* pp. 26–27) was a mere declaration of policy respecting the waters unused by the entryman, which was sub-

ject to change at any time by Congress in the exercise of its constitutional power (U. S. Const. Art. IV, § 3, Cl. 2) to control the disposition and use of government property, subject, of course, to the condition that the change in policy may not affect existing vested individual rights. Cf. *Alabama* v. *Texas*, 347 U. S. 272; *United States* v. *City and County of San Francisco*, 310 U. S. 16, 29. No other construction is necessary to give full effect to the aims of these Acts.[17]

B. Contrary to the conclusion of the Court of Appeals in this case, this Court has declared that the United States has not ceded control to the western States of all waters in non-navigable streams crossing federal lands. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690; *Winters* v. *United States*, 207 U. S. 564, affirming 143 Fed. 740 (C. A. 9). In the *Rio Grande* case, the United States sought to enjoin a proposed diversion of the waters of the Rio Grande in the non-navigable portions of the river which, for purposes of deci-

[17] Congress has never regarded the Acts of 1866, 1870, and 1877 as irrevocable surrenders of the rights of the United States in the waters on the public lands. There are numerous statutes, enacted after 1877, exercising control over non-navigable waters of the public domain. See e. g., Act of June 3, 1878, c. 151, 20 Stat. 89, 43 U. S. C. 311; Act of March 3, 1891, c. 561, sec. 18, 26 Stat. 1101, 43 U. S. C. 946; Act of June 4, 1897, c. 2, 30 Stat. 36, 16 U. S. C. 481; Act of June 11, 1906, c. 3074, sec. 3, 34 Stat. 234, 16 U. S. C. 508; Act of June 25, 1910, c. 421, 36 Stat. 847, 43 U. S. C. 141, 142; and the Federal Power Act of June 10, 1920, c. 285, § 24, 41 Stat. 1075, 16 U. S. C. 818, Appendix A, *infra*, pp. 61–63.

sion, the Court assumed would impair the navigable capacity of the lower reaches. It was contended by the Irrigation Company that the diversion was authorized by the 1866 Act and the Desert Land Act. Adverting to a later statute prohibiting obstructions to navigation without the consent of Congress (Act of September 19, 1890, 26 Stat. 454, § 10), the Court rejected the claim, saying (174 U. S. at 707):

> As this is a later declaration of Congress, so far as it modifies any privileges or rights conferred by prior statutes it must be held controlling, at least as to any rights attempted to be created since its passage; and all the proceedings of the appellees in this case were subsequent to this act. * * *

In *Winters, supra,* the United States sued to restrain Winters and others from constructing or maintaining dams or reservoirs in the Milk River (a nonnavigable stream in Montana which, as in the instant case, formed one boundary of an Indian Reservation) or in any manner preventing the waters of the river or its tributaries from flowing to the Reservation. The Reservation had been established in 1888, subsequent to the Acts of 1866, 1870, and the Desert Land Act of 1877. Nonetheless, citing the *Rio Grande* case, *supra,* this Court held against Winters, saying (207 U. S. at 577), "* * * The power of the Government to reserve the waters and exempt them from appro-

priation under the state laws is not denied, and could not be."

The opinion below attributes great weight to *California Oregon Power Company* v. *Beaver Portland Cement Company,* 295 U. S. 142, as supporting the conclusion that the Desert Land Act granted Oregon "complete sovereignty over the waters of the Deschutes River" upon the reserved lands here involved (R. III 1040).[18] The first thing to note about that decision is that it pertained to "public lands", not reserved lands of the character upon which the proposed Pelton Project would be constructed.[19] The Court was

[18] The Ninth Circuit also relies on *Kansas* v. *Colorado*, 206 U. S. 46, but there this Court was merely considering, in the most general terms, the powers of the States to enact laws relating to rights to the use of water, free from control by the Federal Government. There is no substantial discussion of the Desert Land Act, nor was it involved.

[19] The Court was addressing itself to lands acquired by "patent from the United States under the Homestead Act of May 20, 1862" (p. 151). In discussing the Acts of 1866, 1870, and 1877, the Court refers frequently to the "public lands" and "public domain" (see pp. 155, 157, 158, 160, 161, 162) and speaks constantly in terms of settlers who obtained land under the homestead, preemption, and other federal land laws.

The *California Oregon* case involved a conflict between two users of water on a non-navigable Oregon stream. One claimant relied on riparian rights which it contended attached to its land which had been patented by the United States after the Desert Land Act but, so the contention was, before Oregon abandoned the riparian rule. The other claimant relied on prior appropriation of the water. The Court resolved the dispute against the riparian claim, since the land patent from the United States carried with it (after the Desert Land Act) no right to the use of water.

speaking of "public lands" when it said: "* * * The fair construction of * * * [the Desert Land Act of 1877] is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. * * * What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris,* subject to the plenary control of the designated states * * *." 295 U. S. at 162, 163–164. Nothing in this statement reveals any basis to conclude that the United States has relinquished all rights in non-navigable streams traversing its *reserved* land. On the contrary, the Court specifically limits the principle to *public lands* open to private entry and for which patents could be issued. See *supra,* pp. 28–29.

But even as to "public lands," the Court did not announce that the United States had ceded full title and control of the waters to the States. Rather, the decision declared that subsequent to the Desert Land Act the public lands would be patented separately from waters on those lands. The laws of Congress as to patenting the land would continue. However, Congress prescribed that thereafter the surplus waters on the public

lands would be acquired in accordance with the laws of the States. Accordingly, two properties of the United States formerly acquired together, land and the right to the use of water, were separated and different means for their acquisition provided. The title to lands would be acquired in accordance with the acts of Congress alone. On the other hand, the title to the rights to the use of waters on the public lands would be acquired, pursuant to the Acts of 1866, 1870 and 1877, through compliance with the State laws. However, title to the land and the rights to the use of water remained in the United States until there had been fulfillment of the conditions imposed by Congress for their acquisition.

It is true that the Court held that, after 1877, "all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states * * *." (295 U. S. at 163-164.) But "plenary control" by the State of the manner in which the *public* could acquire *from the United States* rights to the use of water upon public land is not a recognition of any transfer of the title to those rights to the States. This Court limited its holding to deciding that such rights could be acquired in whatever manner the States might prescribe. Until an appropriator has complied with the requirements prescribed, power of control and title to those rights

remains in the United States where it has always resided. Kinney on *Irrigation and Water Rights,* Vol. 1, 2d ed., sec. 411, pp. 692–3.[20]

So interpreted, the 1877 Act has a direct parallel in the mining laws which stem from the same precursor Acts of 1866 and 1870.[21] State and local mining laws were adopted by Congress as subsidiary regulations to govern the disposition of government mineral property to locators. See *Butte City Water Co.* v. *Baker,* 196 U. S. 119. This Court there recognized that the United States retained title to the minerals not privately acquired under the statutes and that Congress retained its full measure of constitutional control over their disposition. Similarly, in the case of unappropriated rights to the use of water, under the Desert Land Act the United States

---

[20] The opinion below (R. III 1929) quotes an excerpt from the earlier Ninth Circuit case of *United States* v. *Hanson,* 167 Fed. 881, which is similar to the language in the *California Oregon* opinion and subject to the same construction. If the *dictum* (which relates only to "public lands") is broader, it must be regarded as overruled by later Ninth Circuit rulings. See *supra,* pp. 28–29; *infra,* pp. 47–48.

[21] Section 1 of the 1866 Act even contained a mineral counterpart to the general "public use" provision of the 1877 Act as to water: "That the mineral lands of the public domain * * * are hereby declared to be free and open to exploration and occupation by all citizens of the United States * * *."

retains its full measure of constitutional control over the disposition of them. See *infra*, pp. 46–47, for the same comparison by the Supreme Court of Oregon.

See also Point III, *infra*, pp. 43–53, for discussion of the United States' *ownership* of the unappropriated water.

C. Since the Desert Land Act did not cede to Oregon all title, power, and authority of the United States over the Deschutes River, but merely provided for the acquisition of *private* title under State law, that Act confers no power on Oregon to control the Pelton Project. For the Project will interfere with no pre-existing rights and will leave the flow of water undiminished for future use. The result is that since there is no interference with any authority granted by the Act, it can have no effect on the present case. Federal powers of regulation and control remain unimpaired by anything in the 1866, 1870, and 1877 legislation.

But even if the Desert Land Act (and the earlier statutes) did confer some power on Oregon to enact some type of regulatory laws relating to the Deschutes River at the project site, the Ninth Circuit's decision that such State legislation dominates the Power Commission's license conflicts with the holding of this Court in *First Iowa Hydro-Electric Coop.* v. *Federal Power*

Commission, 328 U. S. 152. The issue in the *First Iowa* case was whether compliance with requirements imposed by Iowa law comparable to those here involved was a necessary prerequisite to the granting of a license by the Commission, in view of the provisions of Section 9 (b) of the Federal Power Act.[22] This Court held that the Federal Power Act superseded State law and that the securing of a State permit was not a condition precedent to the obtaining of a federal license. "The Act leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce, administer the public lands and reservations of the United States and, in certain cases, exercise authority under the treaties of the United States." 328 U. S. at 171. "The detailed provisions of the Act," this Court said, "providing for the federal plan of regulation leave no room or need for conflicting state controls." 328 U. S. at 181.

---

[22] Section 9 (b) provides that each applicant for a license shall submit:

"Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act."

III

THE UNITED STATES IS THE OWNER OF THE UNUSED AND UNAPPROPRIATED RIGHTS TO THE USE OF WATER FOR THE GENERATION OF ELECTRICITY AT THE POINT ON THE DESCHUTES RIVER WHERE THE PELTON POWER DAM AND PLANT WOULD BE CONSTRUCTED

As disclosed in Point II, the Desert Land Act gives Oregon no power of regulation or control contrary to the license issued by the Federal Power Commission for the construction of the Pelton power dam and power plant upon the reserved lands of the United States. As we have shown, the Power Commission has been granted by the Congress authority to issue the license under the circumstances found by it to prevail, free from restraint by the State. As a consequence, we need not show that the United States is the *owner* of the presently unused and unappropriated rights to the use of water which the Pelton project would utilize to generate greatly needed electricity. But we put forward the claim of *ownership* of those unappropriated, unused and presently wasted rights to the use of water as an additional reason why the State is powerless to interfere. For if one thing is plain in Constitutional law it is that the States cannot regulate or control the use or disposition by the United States of its own property. *Supra*, pp. 21–23.[20]

---

[20] The head of water now flowing at the point where the power dam and plant is to be constructed is presently unused

A. *Title to the rights to the use of unappropriated water in a non-navigable stream on federal land resides in the United States.*—Concededly, the United States still owns the lands themselves (*supra*, pp. 21–22, 29–30). The discussion in Point II, *supra*, pp. 31–41, proves that the Acts of 1866, 1870 and 1877 did not divest the United States of title to the right to the unappropriated water in non-navigable streams on federal lands. The only federal title ceded by that legislation was to the persons who appropriated and used water in compliance with the terms of the three statutes. The remaining title and rights of the United States were left unaffected.[24] See, particularly, the discussion at pp. 38–40, *supra*.

That the United States retains ownership of the unappropriated waters on its public lands has long been recognized. In the case of *California Oregon Power Company* v. *Beaver Port-*

---

and unappropriated. It is not open to question that the construction and operation of the project will have no effect on existing rights to the use of water at or below the project site (*supra*, pp. 6–7). In fact, as heretofore noted, *supra*, p. 10, the licensee expressly provides that the use by the Pelton Project of the rights in question would be subject to all existing rights "whether or not perfected" (R. II 443).

Oregon does not assert that it has appropriated the waters of the Deschutes River for a beneficial use, nor that it has complied with the Desert Land Act's requirement for appropriation.

[24] This conclusion is *a fortiori* correct if, as we have argued, the Desert Land Act (and related legislation) do not apply at all to reserved lands such as those involved here. Point I, *supra*, p. 25 *et seq.*

land Cement Company, supra, pp. 37–40, this Court favorably cites the case of *Howell* v. *Johnson,* 89 Fed. 556, 558 (C. C. D. Mont.), in support of its decision. The *Howell* opinion declares: "The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper. * * * It is urged that in some way the state of Montana has some right in these waters in Sage creek or some control over the same. It never purchased them. It never owned them."

The Supreme Court of Oregon follows the same rule. The opinion in *Hough* v. *Porter,* 51 Ore. 318, was characterized as "well reasoned" in the *California Oregon* decision (295 U. S. at 160–1), and this Court declared that it "reaches the right conclusion." There, the Oregon court—in concluding that the Congress by the Desert Land Act of 1877, as the owner of the public domain, could sever the land from the unappropriated rights to the use of water and prescribe the means pursuant to which title to each could be acquired—compared that Act with the provisions respecting the mineral lands of the National Government. 51 Ore. 318, 391. See *supra,* pp. 39–40. It pointed out that one who acquires a homestead "takes such land subject to the exception that he does not acquire title to the minerals * * *." Proceeding with that comparison of the

acts of Congress respecting minerals and rights to the use of water, the court declared: "It was in the exercise of a similar prerogative on the part of the government that there was by the act of 1877 *given to the public,* or to any individual thereof, *the right to appropriate* and apply to a beneficial use the waters flowing through its public domain. * * * This unquestioned power of the owner over the public domain was exercised, * * *; the import thereof being that *this right incident to the soil was reserved by the government, to be held in trust for the public,* and that he who first applies the water to a beneficial use shall become the owner of the right thereto * * *." [Emphasis added.] As did this Court, the Oregon court relied heavily on the decision of *Howell* v. *Johnson, supra,* 51 Ore. 318, 389.

This conclusion is in full accord with the Oregon court's earlier declaration in *Morgan* v. *Shaw,* 47 Ore. 333, 337, in which that court said: "An appropriation of water is *a grant* by the general government to the settler of the right to its use from a nonnavigable stream * * *." [Emphasis added.] In *Nevada Ditch Co.* v. *Bennett,* 36 Ore. 59, 104, the court declares: "* * * the government can deal with its lands as other land proprietors can deal with theirs. In the Pacific Coast states congress has recognized the privilege of private citizens to acquire usufructuary interests in the waters of public streams, independent of

riparian ownership. This is but one way, however, of disposing of the public domain."

In the latter case, the Oregon court also explicitly recognized the title of the United States to the rights to unappropriated water (30 Ore. at 103–104):

> It may be predicated of the waters of nonnavigable streams upon the public domain, that are not appropriated by the methods cognizant to law, that they are as much the property of the government as the lands through which they flow. * * * the waters of non-navigable streams are part of such public domain, and hence the property of the government, which may lay hold of and use them, without taking any of the steps made necessary to obtain an usufructuary interest therein by private individuals.

It is also most significant that the Court of Appeals for the Ninth Circuit, in its decisions in recent years, has repeatedly supported the view that the United States has retained title to the unappropriated rights to the use of water. *United States* v. *McIntire*, 101 F. 2d 650, 654 (C. A. 9); *United States* v. *Walker River Irr. Dist.*, 104 F. 2d 334, 336–337 (C. A. 9). Those decisions are in full accord with its earlier decisions on the subject. *Winters* v. *United States*, 143 Fed. 740, 747 (C. A. 9), affirmed, 207 U. S. 564; *Conrad Investment Co.* v. *United States*, 161 Fed. 829 (C. A. 9); *Bean* v.

Morris, 159 Fed. 651, 654 (C. A. 9), affirmed, 221 U. S. 485. Similarly, the decisions of the federal district courts support that conclusion. *Howell* v. *Johnson,* 89 Fed. 556, 558–559 (C. C. D. Mont.); *Anderson* v. *Bassman,* 140 Fed. 14, 20 (C. C. N. D. Cal.); *Cruse* v. *McCauley,* 96 Fed. 369, 373 (C. C. Mont.). Equally important, as shown above, is the fact that Oregon's Supreme Court has explicitly held that the title to the unappropriated rights to the use of the water resides in the United States and that an appropriation of rights to the use of water constitutes a grant from the National Government. See *supra, Nevada Ditch Co.* v. *Bennett,* 30 Ore. 59, 104; *Brown* v. *Baker,* 39 Ore. 66, 68; *Morgan* v. *Shaw,* 47 Ore. 333, 337; *Williams* v. *Altnow,* 51 Ore. 275, 298; *Hough* v. *Porter,* 51 Ore. 318, 382 *et seq.*

Kinney, based on an impressive body of decisions (Kinney on *Irrigation and Water Rights,* Vol. 1, 2d ed., sec. 411, pp. 692–3), likewise concludes that title to the unappropriated rights to the use of water resides in the United States:

> The Government is still the owner of the surplus of the waters flowing upon the public domain, or rather the owner of all the waters flowing thereon remaining after deducting the rights to the use of the same which have vested in and accrued in some legal way to individuals and companies. * * * It therefore follows, as the result of the ownership by the United States of the waters flowing upon the public

> domain, that any dedication by a State of all the waters flowing within its boundaries to the State or to the public amounts to but little, in the face of any claim which may be made by the Government, *at least* to all the surplus or unused waters within such State.[25] [Emphasis added.]

This review reveals the plain error of the Court of Appeals. The title to the unappropriated rights to the use of water which are here involved

---

[25] Text writers generally agree with Kinney that the United States is the source of the title to rights to the use of water. Farnham, *Waters and Water Rights*, Vol. 3, Sec. 657, p. 2042 *et seq.*, citing numerous decisions from the Western States; Gould, *Waters*, 3d ed., Sec. 473 *et seq.*; Pomeroy, *Water Rights*, Black Ed., 2d ed., p. 32 *et seq.* Wiel cites numerous cases supporting the principle that title to rights to the use of water is deraigned from the United States. 1 Wiel, *Water Rights in the Western States*, 3d ed., Sec. 177, *et seq.* The same author declares that the so-called Colorado doctrine denies the Federal ownership of rights to the use of water by reason of the abrogation of the common law doctrine of the riparian right. I Wiel, *Water Rights in the Western States*, 3d ed., Sec. 185, *et seq.* There is no basis for that view in the light of the recognized and well established precept that the States are free to determine for themselves whether they adhere to the riparian doctrine, the doctrine of prior appropriation, or the hybrid theory in which both riparian and appropriative rights are recognized. As this Court points out: "Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters * * *." *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 703; see also *Hough* v. *Porter*, 51 Ore. 318, 400, 402.

resides in the United States, and in the use or disposition of those unappropriated rights it is immune from State regulation. *Supra*, pp. 22–23. As this Court specifically declared in regard to rights to the use of water in nonnavigable streams: "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be." *Winters* v. *United States*, 207 U. S. 564, 577.

B. *The unappropriated right to use the waters of the Deschutes River to generate electricity is a real property right.*—It remains only to point out that the right to use the head of water in the Deschutes now being wasted is a property interest which the United States owns. This Court has long ago recognized that a head of water in a stream is an interest in property which, when owned by the United States, may be leased by it to concerns engaged in the development and distribution of electricity. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 73. More recently, in regard to the rights of the United States to administer the property interest which it holds in a head of water in a stream, the Court said: "The power of falling water was an inevitable incident of the construction of the dam. That water power came into the exclusive control of the Federal Government. The mechanical energy was convertible into electric energy, *and the water power, the right to convert it into electric energy,*

and the electric energy thus produced, *constitute property belonging to the United States.* * * * Authority to dispose of property constitutionally acquired by the United States is expressly granted to the Congress by section 3 of Article IV of the Constitution. * * *" *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 330. [Emphasis added.]

Few tenets of Western water law are more firmly established than that which recognizes a right to the use of water as an interest in real property. "This usufructuary right, or 'water-right,' * * * is real property. It is as fundamental under the law of riparian rights as under the law of appropriation." Wiel, *Water Rights in the Western States,* 3d ed., vol. 1, sec. 18, pp. 20, 21. "The right to the flow and use of water, being a right in a natural resource, is real estate. * * * The right to have water flow from a river into a ditch is real property. A wrongful diversion of water is an injury to real property. The right to take water from a river and conduct it to a tract of land is realty. * * * An action to quiet title as for real property is proper. And an action to settle rights is one to quiet title to realty." Moreover, a right to the use of water has "all the dignity of and is an estate of fee simple, or a freehold." Wiel, *Water Rights in the Western States,* 3d ed., vol. 1, sec. 283, pp. 298–300; sec. 285, p. 301. "As has

been held in numerous cases, a water right is real property."[26]

Oregon has the same rule. Its statutes provide, "All water used * * * for any purpose shall remain appurtenant to the premises upon which it is used * * *" (8 Oregon Compiled Laws Anno., Sec. 116–606), and "* * * the term 'real property' includes all lands, tenements, and hereditaments, and rights thereto, and all interest therein * * *." (2 Oregon Compiled Laws Anno. 16–402.) In particular, Oregon recognizes that rights of the Federal Government to use of water on federal lands are entitled to the same protection as its interests in and rights to the land itself. The Admission Act pursuant to which the State of Oregon joined the Union provides: "* * * said State shall never interfere with the primary disposal of the soil within the same by the United States, * * *."[27] The Supreme Court of Oregon has established the term "soil" as being synonymous with real property, referring to rights to the use of water as being "incident" to the soil. *Hough* v. *Porter,* 51 Ore. 318, 391. It has likewise been stated that: "In these provisions [of the enabling legislation] the waters flowing within

[26] 19 Rocky Mountain Law Review 63. See also *Davis* v. *Randall*, 44 Colo. 488, 492; *Lindsey* v. *McClure*, 136 F. 2d 65, 70 (C. A. 10); *Comstock, Exec.* v. *Olney Springs Drainage Dist.*, 97 Colo. 416, 419.

[27] Admission Act, Act of February 14, 1859, Chap. 33, Sec. 4, 11 Stat. 383, 384; 9 O. C. L. A., Acceptance of Proposition, Approved June 3, 1859, pp. 75, 76; Appendix A, *infra*, pp. 67–68.

the boundaries of the State must be included as a part and parcel of the public lands." Kinney on *Irrigation and Water Rights,* Vol. 2, 2d ed., Sec. 638, page 1118.

It is thus clear that under Oregon and general law (1) the United States is the owner of the unappropriated rights to the use of water of the Deschutes River which the licensee would apply beneficially to generate electricity and thus to aid in alleviating the severe power shortage in the Pacific Northwest which the Federal Power Commission found to exist; and (2) the unappropriated right to the use of water now being wasted is an interest in real property, title to which resides in the United States.

IV

THERE ARE ADDITIONAL REASONS WHY OREGON CANNOT BAR THE PELTON PROJECT

If the Court should not fully accept the contentions we have been urging in Points I, II, and III, there are two additional reasons why Oregon's objection to the Pelton Project cannot stand. The *first* is that effective power to consent or object lies not with the State but with the Indians of the Warm Springs Reservation; the *second* is that whatever powers or rights the States may have under the Desert Land Act do not extend to the protection of fish in non-navigable streams crossing federal lands.

A. The Indians have consented to the occupancy by the Company of these reserved lands and to the interference with their rights to and use of the stream. *Supra*, p. 5. The Indians' rights to the use of those waters are continuing ones against the United States and its grantees, as well as the State and its grantees. *United States* v. *Winans*, 198 U. S. 371. Such rights arose before the Desert Land Act and are prior to later appropriative rights. *Winters* v. *United States*, 207 U. S. 564. See *supra*, pp. 29–30.[28] The Federal Government, not the State, has power over Indian lands and rights. *Supra*, pp. 21–22, 29–30.

Oregon has expressly recognized these principles. The Act establishing the Territorial Government of Oregon declares: "* * * nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would

[28] As noted above (*supra*, pp. 28–29), the consistent holdings of the Ninth Circuit have been that the Desert Land Act (and related statutes) do not apply to water on Indian reservations. *Winters* v. *United States*, 143 Fed. 740, affirmed, 207 U. S. 564; *United States* v. *McIntire*, 101 F. 2d 650; *United States* v. *Walker River Irr. Dist.*, 104 F. 2d 334.

have been competent to the government to make if this act had never passed: * * *." Act of August 14, 1848, 9 Stat. 323, 328 (Appendix A, *infra*, pp. 66–67). The Oregon Constitution of 1859, continued this provision in effect by providing for continuance of territorial laws. Art. XVIII, Sec. 7 (Appendix A, *infra*, p. 68). And on June 3, 1859, the people of Oregon adopted in these terms the proposition propounded by Congress in the Admission Act for the State of Oregon: "Be it ordained by the legislative assembly of the state of Oregon, That the said state shall never interfere with the primary disposal of the soil within the same by the United States, * * *." Admission Act, Act of February 14, 1859, Chap. 33, Sec. 4, 11 Stat. 383, 384; Acceptance of Propositions, approved June 3, 1859, 9 O. C. L. A., pp. 75, 76 (Appendix A, *infra*, pp. 67–68).

In these circumstances, it is clear that the Treaty of 1855 governs here, even under Oregon law. By that Treaty, "* * * the exclusive right of taking fish in the streams running through and bordering" the reservation is reserved to the Warm Springs Indians. 12 Stat. 964. The Supreme Court of Oregon recognizes that this Treaty is "binding upon Oregon" as the law of the land. *Anthony* v. *Veatch*, 189 Ore. 462, 485. As Judge Healy pointed out below (R. III 1043), the Treaty "fishing rights" provision gives the Indians, not the State, the power to

control the fishing resources of the Deschutes River bordering the reservation. The State has no concern with those resources.

B. Moreover, it is our position that nothing in the Desert Land Act or its purpose justifies the conclusion that the local laws, customs, and decisions there given recognition include State regulations for the protection of fish. On the contrary, it seems clear that Congress did not intend to confer such power on the State. The Desert Land Act deals, in terms, only with the usual problems incident to use of water for irrigation and like purposes. Other federal legislation concerns fish. The Wildlife Resources Act of August 14, 1946, 60 Stat. 1080, 16 U. S. C. 661, for the conservation of wildlife, fish and game, provides (Section 2, 16 U. S. C. 662) that whenever "the waters of any stream or other body of water are authorized to be impounded, diverted, or otherwise controlled for any purpose whatever by any department or agency of the United States, or by any public or private agency under Federal permit" such department or agency "shall consult with the Fish and Wildlife Service and the head of the" State agency "exercising administration over the wildlife resources of the State" with "a view to preventing loss of and damage to wildlife resources." The recommendations of the State agency as to the fish and wildlife resources are to be given due consideration but there is no requirement which makes them controlling. In-

stead, there is the assertion of federal control. House Rept. No. 1944, 79th Cong., 2d Sess., p. 3; *State of Iowa* v. *Federal Power Commission,* 178 F. 2d 421, 428 (C. A. 8), certiorari denied, 339 U. S. 979. In the case of a project requiring a license under the Federal Power Act, the final decision as to the resolution of the fishing resources is left to the Federal Power Commission.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the court below should be reversed and that the case be remanded to that court with instructions to affirm the order of the Federal Power Commission granting a license for the Pelton Project.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
J. LEE RANKIN,
Assistant Attorney General.
OSCAR H. DAVIS,
WILLIAM H. VEEDER,
Special Assistants to the Attorney General.
WILLARD W. GATCHELL,
General Counsel,
JOHN C. MASON,
LOUIS C. KAPLAN,
Attorneys,
Federal Power Commission.

JANUARY 1955.

APPENDIX A

STATUTORY PROVISIONS

1. The pertinent provisions of the Federal Power Act, 49 Stat. 838, as amended, 16 U. S. C. 791a, *et seq.*, are as follows:

* * * * *

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations", as hereinafter defined;

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks; * * *

* * * * *

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of

such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority; * * *

* * * * *

SEC. 4. The Commission is hereby authorized and empowered—

* * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding

by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * *

SEC. 9. That each applicant for a license hereunder shall submit to the commission—

* * * * *

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

* * * * *

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * *

SEC. 24. Any lands of the United States included in any proposed project under the provisions of this Part shall from the date of filing of application therefor be reserved from entry location, or other disposal under the laws of the United States until other-

wise directed by the Commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this Part, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this Part, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdic-

tion, said bond to be in the form prescribed by the Commission: *Provided*, That locations, entries, selections, or filings heretofore made for lands reserved as water-power sites, or in connection with water-power development, or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained: *Provided further*, That before any lands applied for, or heretofore or hereafter reserved, or classified as power sites, are declared open to location, entry, or selection by the Secretary of the Interior, notice of intention to make such declaration shall be given to the Governor of the State within which such lands are located, and such State shall have ninety days from the date of such notice within which to file, under any statute or regulation applicable thereto, an application for the reservation to the State, or any political subdivision thereof, of any lands required as a right-of-way for a public highway or as a source of materials for the construction and maintenance of such highways, and a copy of such application shall be filed with the Federal Power Commission; and any location, entry, or selection of such lands, or subsequent patent thereof, shall be subject to any rights granted the State pursuant to such application.

* * * * *

SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for

municipal or other uses, or any vested right acquired therein.

* * * * *

2. The Desert Land Act of 1877, 19 Stat. 377, 43 U. S. C. 321, provides as follows (as it appears in the United States Code):

§ 321. *Entry right generally; extent of right to appropriate waters.*

It shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of 25 cents per acre—to file a declaration under oath with the officer designated by the Secretary of the Interior of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter: *Provided, however,* That the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said

one-half section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the officer designated by the Secretary of the Interior of the reclamation of said tract of land in the manner aforesaid, and upon the payment to such officer of the additional sum of $1 per acre for a tract of land not exceeding three hundred and twenty acres to any one person, a patent for the same shall be issued to him: *Provided*, That no person shall be permitted to enter more than one tract of land and not to exceed three hundred and twenty acres which shall be in compact form.

The Act of July 26, 1866, Section 9, 14 Stat. 251, 253, and the Act of July 9, 1870, Section 17, 16 Stat. 218, provide as follows (as they appear in the United States Code, 43 U. S. C. 661):

§ 661. *Appropriation of waters on public lands; right of way for canals and ditches.*

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any

settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

All patents granted, or preemption or homesteads allowed shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section. (R. S. §§ 2339, 2340.)

3. The Act of August 14, 1848, 9 Stat. 323, 328, secs. 1 and 12, establishing the Territorial Government of Oregon; the Admission Act of Oregon into the Union, Act of February 14, 1859, 11 Stat. 383, 384, Preamble and Section 4; the Acceptance of Propositions, 9 Oregon Compiled Laws Annotated, pages 75, 76, provide as follows:

The Act of August 14, 1848

[§ 1.] That from and after the passage of this act, all that part of the Territory of the United States which lies west of the summit of the Rocky Mountains, north of the forty-second degree of north latitude, known as the Territory of Oregon, shall be organized into and constitute a temporary government by the name of the Territory of Oregon: *Provided,* That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise,

which it would have been competent to the government to make if this act had never passed: * * *

* * * * *

§ 12. *And be it further enacted*, That the rivers and streams of water in said Territory of Oregon in which salmon are found, or to which they resort, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.

Admission Act of Oregon into the Union

[Preamble.] Whereas the people of Oregon have framed, ratified, and adopted a constitution of State government which is republican in form, and in conformity with the Constitution of the United States, and have applied for admission into the Union on an equal footing with the other States: Therefore—

* * * * *

SEC. 4. * * * the following propositions be, and the same are hereby, offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said state of Oregon, to wit: * * * that said state shall never interfere with the primary disposal of the soil within the same by the United States, * * *.

Acceptance of Propositions, 9 Oregon Compiled Laws Annotated, pages 75, 76.

Acceptance of propositions by state legislative assembly. * * *

Be it ordained by the legislative assembly of the state of Oregon, That the said state shall never interfere with the primary disposal of the soil within the same by the

United States, nor with any regulations congress may find necessary for securing the title in said soil to the bona fide purchasers thereof; * * *.

4. The Constitution of Oregon, 1859, provided in Art. XVIII, Sec. 7:

> § 7. All laws in force in the territory of Oregon when this constitution takes effect, and consistent therewith, shall continue in force until altered or repealed.

5. The pertinent provisions of the Water Code of the State of Oregon provide (8 O. C. L. A. §§ 116–401, 116–402 (1944–1947 Secondary Pocket Part), 119–102, 119–103):

> § 116–401. *Public ownership of waters.* All water within the state from all sources of water supply belong to the public. [L. 1909, ch. 221, § 1, p. 370; L. O. L. § 6575; O. L. § 5715; O. C. 1930, § 47–401.]
>
> § 116–402. *Right of appropriation: Vested rights not affected: Certain waters excepted.* Subject to existing rights, all waters within the state may be appropriated for beneficial use, as herein provided, and not otherwise; but nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation, or association to any water; * * *. [Am. L. 1945, ch. 58, § 1.]
>
> * * * * *
>
> § 119–102. *Appropriation and use of water for power governed by act.* From and after the date when this act takes effect no right to appropriate or to use the waters of the lakes, rivers, streams or other bodies of water within the state of Oregon, including water over which this state has concurrent jurisdiction, in connection with

the development of any water-power project for the generation of electricity, shall be initiated, perfected, acquired or held, except for and during the period or periods or extensions thereof as herein stated, and pursuant to the provisions hereof. [L. 1931, ch. 67, § 2, p. 82; O. C. 1935, Supp. § 47–2102.]

§ 119–103. *Water-power projects except in conformity with act prohibited.* From and after the taking effect of this act, no water-power project involving the use of the waters of any of the lakes, rivers, streams or other bodies of water within the state of Oregon, including waters over which this state has concurrent jurisdiction, for the generation of electricity, shall be begun or constructed except in conformity with the provisions hereof. [L. 1931, ch. 67, § 3, p. 83; O. C. 1935 Supp. § 47–2103.]

6. The pertinent provisions of the Fish and Game Code of the State of Oregon provide (5 O. C. L. A. §§ 83–314 and 83–316):

§ 83–314. (*Fishways: Necessity for providing over obstructions in streams: Examination and order to build: Punishment for failure: Duty to keep in repair: Injuring fishway unlawful: Taking fish near fishway unlawful: Jurisdiction to enforce provisions.*) (a) It shall be unlawful for any person to construct any dam or artificial obstruction across any stream in this state frequented by salmon or other food fish, or to maintain any such dam or obstruction heretofore erected without providing a passageway for such fish over such obstructions, such passageway for fish to be constructed as near the main channel as may be practicable. It shall be the duty of the

master fish warden to examine, from time to time, all dams and artificial obstructions in all rivers and streams in the state frequented by salmon or other food fish, and if in his opinion there is not a free passage for said fish over any dam or artificial obstruction, to notify the owner or occupant thereof to provide the same within a reasonable time, with a durable and efficient fishway, of such form and capacity and in such location as shall be determined by the master fish warden. If such fishway is not completed to the satisfaction of said master fish warden within the time specified, the owners or occupants of such dam or artificial obstruction shall be deemed guilty of a misdemeanor, and on conviction shall be punished as in this act hereinafter provided. It shall be incumbent upon the owners and operators of all dams or artificial obstructions, where the master fish warden requires such fishway to be provided, to keep the same in repair and open and free from obstruction to the passage of said fish at all times, and any owner or operator of any dam or artificial obstruction who neglects or refuses to keep such fishway in repair and open and free from obstruction to the passage of said fish shall be guilty of a misdemeanor, and upon conviction shall be punished as in this act hereinafter provided; and the continuance from day to day of the neglect or refusal, after notification in writing by the master fish warden, shall constitute a separate offense for each day.

(b) It shall be unlawful for any person to wilfully or knowingly destroy, injure or abstract from such fishway, or to take or catch any salmon or other food fish within

600 feet below any fishway; provided, however, that fishing with hook and line only shall be permitted 200 feet below any fishway.

(c) The master fish warden and all deputy or special fish wardens shall have jurisdiction to enforce the provisions of this section. [L. 1921, ch. 105, § 47, p. 156; O. C. 1930, § 40–215; L. 1931, ch. 180, § 22, p. 255.]

§ 83–316. *Dams to be provided with hatchery, when: (Permit: Conveyance of necessary land: Operation of hatchery: Bond: Dams heretofore constructed).* In the event that any person desires to construct a dam in any of the streams of this state to a height that will make a fish ladder or fishway thereover impracticable, in the opinion of the commission, then such person may make an application to the commission for a permit to construct such dam, and the commission is hereby authorized to grant such permit in its discretion, upon the condition that the person so applying for such permit shall convey to the state of Oregon a site of the size and dimensions satisfactory to the commission, at such place as may be selected by the commission, and erect thereon a hatchery and hatchery residence, according to plans and specifications to be furnished by the commission, and enter into an agreement with the commission, secured by a good and sufficient bond, to furnish all water and light, without expense, to operate said proposed hatchery; and no permit for the construction of any such dam shall be given by the commission until the person applying for such permit shall have actually conveyed said land to the state and erected said

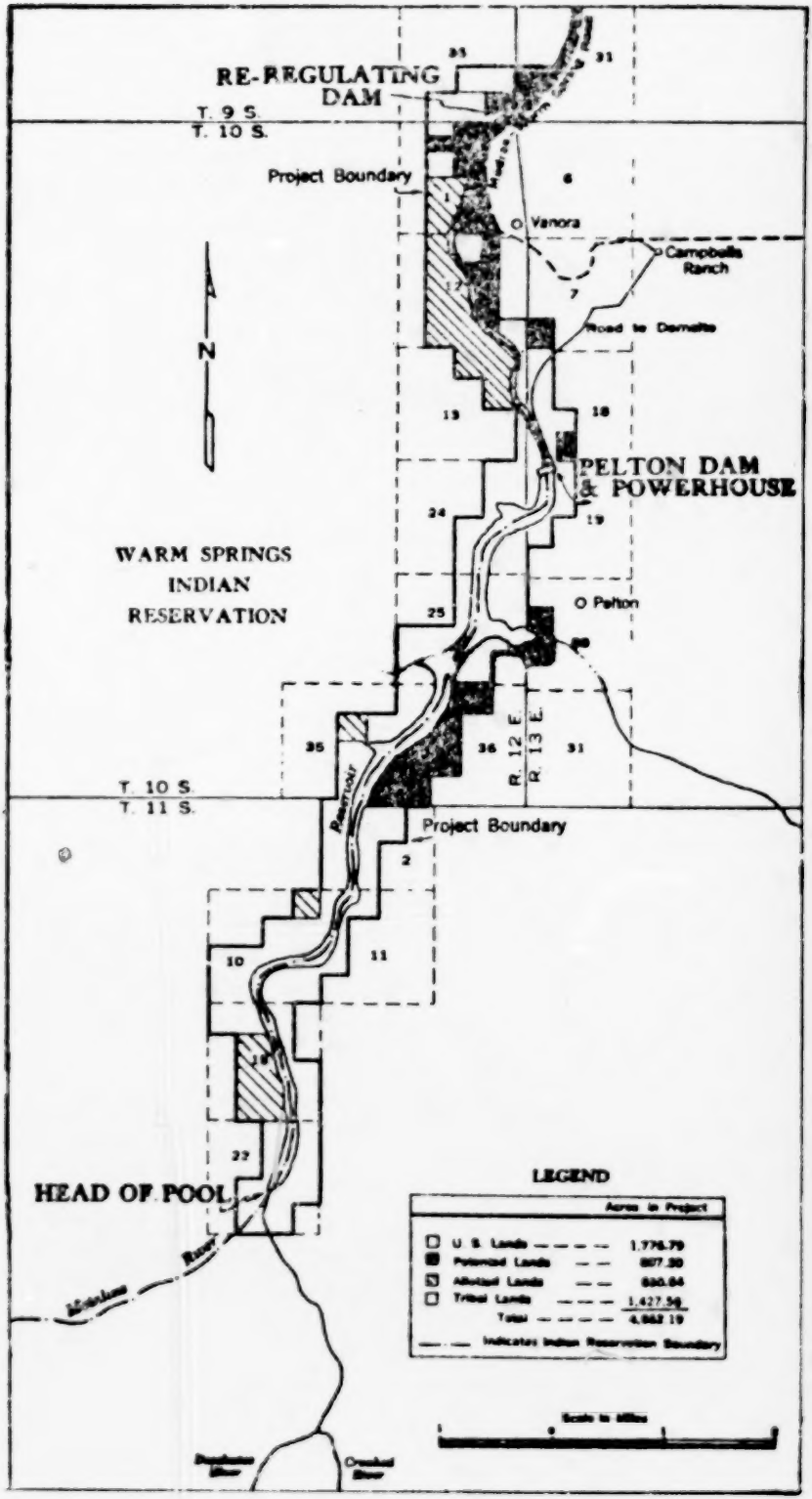
hatchery and hatchery residence in accordance with the said plans and specifications. The provisions of this section shall not apply to cases where dams have been heretofore constructed in streams to a height where the construction of a fish ladder is impracticable, provided an agreement has been entered into and executed with reference to the construction and maintenance of such dam between the commission and the owners thereof. [L. 1921, ch. 105, § 49, p. 156; O. C. 1930, § 40–217.]

APPENDIX B

DESCHUTES RIVER
DRAINAGE BASIN

SOURCES OF INFORMATION: APPENDIX K-PLATES 21 & 36
"REVIEW REPORT ON COLUMBIA RIVER AND TRIBUTARIES"
CORPS OF ENGINEERS, DEPT. OF ARMY - OCT 1, 1948, PRINTED AS
HOUSE DOCUMENT 531, 81 ST. CONGRESS, 2 ND SESSION
AND EXHIBIT 3 IN RECORD.

APPENDIX C



U. S. GOVERNMENT PRINTING OFFICE: 1955